No. 80-649

# In the Supreme Court of the United States

OCTOBER TERM, 1980

EDISON ELECTRIC INSTITUTE, ET AL.,
PETITIONERS

*v.*

DOUGLAS M. COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION


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### QUESTIONS PRESENTED

1. Whether petitioners, having failed to file a timely petition for judicial review of certain regulations issued by the Administrator of the Environmental Protection Agency under the Clean Air Act, may obtain judicial review under Section 307(b)(1) of the Act of a letter from EPA responding to petitioners' request for clarification of the regulations, where the letter simply refers them to EPA's brief in the court of appeals defending the regulations against a timely challenge filed by other companies.

2. Whether, in the circumstances of this case, the court of appeals' dismissal of petitioners' petition for review of EPA's letter denied them due process.

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## OPINIONS BELOW

The orders of the court of appeals dismissing petitioners' petition (Pet. App. 3) and denying petitioners' suggestion for rehearing en banc (*id.* at 4) were not accompanied by opinions and are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on June 17, 1980 (Pet. App. 3). A petition for rehearing was denied on July 22, 1980 (Pet. App. 4). The petition for a writ of certiorari was filed on October 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On May 10, 1979, the Environmental Protection Agency issued final regulations (44 Fed. Reg. 27558 *et seq.* (1979), codified in 40 C.F.R. Part 58, reprinted in part at Pet. App. 70-91) prescribing reporting and monitoring requirements relating to ambient air quality standards under the Clean Air Act, 42 U.S.C. (Supp. III) 7401 *et seq.* The regulations, which revoked existing reporting and monitoring requirements in Part 51 of 40 C.F.R. (1978), and which created a new Part 58, were promulgated pursuant to Section 319 of the Act, 42 U.S.C. (Supp. III) 7619, which required EPA to promulgate regulations establishing uniform air quality monitoring criteria.

In a preamble summary of the regulations as first proposed, EPA explained (43 Fed. Reg. 34892 (1978)) that it planned to revise "the requirements for ambient air quality monitoring *for purposes of the State implementation plans (SIP's)* and for reporting air quality data to EPA * * *" (emphasis added). State implementation plans are the programs that the states are required to establish in order to assure compliance with the standards set by EPA for permissible levels of particular pollutants in the ambient air (42 U.S.C. (Supp. III) 7410). The EPA national primary ambient air quality standard for sulfur dioxide specifies a

maximum 24-hour concentration of 365 micrograms per cubic meter that is not to be exceeded more than once a year. 40 C.F.R. 50.4. As petitioners note (Pet. 5-6), emission control limits under state implementation plans may have to be tightened if it appears that the prescribed standard has been exceeded in a given year.

Appendix F, the portion of the new regulations (40 C.F.R. Part 58) at issue in this case, concerns monitoring and reporting requirements for, *inter alia*, sulfur dioxide levels (Pet. App. 87-88). The preamble discussion of Appendix F in the proposed regulations announced that the monitoring data received by EPA would be "used at the national level to evaluate the overall effectiveness of [the] States in achieving national ambient air quality standards * * *." 43 Fed. Reg. 34899 (1978). Both the proposed regulations (*id.* at 34928 & n.3) and the final regulations (Pet. App. 87-88, 90 n.3, 91) call for the annual submission of "the highest and second highest 24-hour averages" of sulfur dioxide concentrations, and they provide that where monitoring data for sulfur dioxide concentration levels are produced by continuous measurement methods, these averages must be "[b]ased on nonoverlapping values computed according to procedures described" in "Guidelines for the Interpretation of Air Quality Standards" (Pet. App. 90 n.3, 91). Continuous measurement methods produce running hourly measurements of sulfur dioxide concentrations and therefore a 24-hour average concentration can be computed for each overlapping 24-hour period in a year rather than only for those 24-hour periods measured from midnight to midnight. The Guidelines explain how to compute nonoverlapping 24-hour average values for sulfur dioxide, *inter alia, i.e.* separate 24-hour average periods.[1] The regulations require

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[1]The proposed regulations would have permitted the submission of a table of certain other data (numbers of 24-hour periods in which concentration levels were in a set of given ranges) on the basis of midnight-to-midnight measurements (43 Fed. Reg. 34928 & n.4 (1978)), but this was changed in the final regulations to require that even this tabular

states to designate certain air monitoring stations as National Air Monitoring Stations (Pet. App. 72, 74) and to use continuous monitoring methods (*i.e.*, those capable of producing hourly measurements) in such stations. 40 C.F.R. Part 58, App. C, 3.1.

2. On July 7, 1979, within 60 days of the promulgation of these regulations, several companies challenged them by filing petitions for review in the United States Court of Appeals for the District of Columbia Circuit. In those consolidated cases (*PPG Industries, Inc., et al.* v. *Douglas M. Costle*, No. 79-1708 through 79-1711), which have been briefed but are awaiting argument, PPG and its co-petitioners contend that EPA has, in its new monitoring regulations, changed the sulfur dioxide standard and that it has done so without statutory authority and without following proper procedures. They contend that the Agency has done this by shifting from a system under which the standard would be violated only if the maximum concentration level were exceeded in a given year during more than one 24-hour-period as measured from midnight to midnight to a system under which the standard would be violated if the maximum concentration level is exceeded during more than one 24-hour period as measured from any given hour of the day, so long as the 24-hour periods on which the violation is based do not overlap.[2]

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information be "[b]ased on overlapping running averages for continuous measurements" as described in the referenced "Guidelines" (Pet. App. 88, 91 n.4). This made the requirements for the tabular information consistent with the requirements for the measurements of the highest and second-highest averages.

[2]EPA contends that the standard has not changed because it has always provided that the maximum concentration levels for sulfur dioxide could not be exceeded during more than one 24-hour period per year. It asserts that the conversion of monitoring stations to continuous monitoring and the calculation of running averages (averages for each 24-hour period during the year, measured from each successive hour) merely enhances the ability of those enforcing the State implementation plans to detect violations of the standard.

Petitioners in this case neither filed a petition to review the regulations within the period prescribed by Section 307(b)(1) of the Act, 42 U.S.C. (Supp. III) 7607(b)(1), nor filed a timely motion for leave to intervene under Rule 15(d) of the Federal Rules of Appellate Procedure. On November 9, 1979, they wrote EPA, noting that some states and EPA regional offices were using "running averages" to enforce the ambient standard for sulfur dioxide; they requested "clarification" assuring them that Appendix F is a reporting requirement only and was not intended to measure compliance with the ambient air quality standard for sulfur dioxide (Pet. App. 132-140). EPA's Office of General Counsel responded in a letter dated March 18, 1980 (Pet. App. 1-2), explaining that the Agency's intent in the regulations is set forth in its brief in *PPG Industries*.

3. On April 25, 1980, petitioners filed a petition for review in the court below, invoking Section 307(b)(1) of the Act, and asserting that they sought review of "40 C.F.R. 50.4 [the ambient air quality standard for sulfur dioxide] and 40 C.F.R. Part 58 [the new monitoring regulations] as interpreted by counsel for the Environmental Protection Agency ("EPA") through a letter dated March 18, 1980." Petitioners also filed a brief as amici curiae in *PPG Industries*.

EPA moved to dismiss the petition for review on the ground that there was no agency action reviewable within the terms of Section 307(b)(1) of the Act. After receiving briefs on this jurisdictional issue, the court of appeals dismissed the petition.

## ARGUMENT

The dismissal of petitioners' petition for review in the court of appeals was consistent with the applicable jurisdictional provisions of the Clean Air Act and conflicts with no decisions of other courts of appeals or of this Court. In the circumstances of this case, no substantial due process issue

is presented. Review by this Court is accordingly unwarranted.

1. a. Petitioners enjoyed the right, under Section 307(b)(1) of the Clean Air Act, to file with the United States Court of Appeals for the District of Columbia a petition for review of EPA's nationally applicable ambient air quality monitoring regulations within 60 days of the date of the notice of promulgation of the regulations. They also had the right under Fed. R. App. P. 15(d) to intervene in the review proceeding initiated by the timely petitions of other companies seeking to challenge the regulations within 30 days after the filing date of the petitions. Asserting that they were uncertain of the significance of the regulations, petitioners sought to avoid these limitations on challenges to the regulations by (a) requesting "clarification" from the Administrator, (b) characterizing EPA's response, which simply referred to the Agency's brief defending the regulations in the court of appeals, as an official interpretation of the regulations, and (c) filing a review petition with the court of appeals nearly a year after the regulations in question were promulgated, on the theory that the EPA letter of March 18, 1980, constituted "final agency action," reviewable under Section 307(b)(1) of the Act.

b. By dismissing the petition for review, the court of appeals implicitly found that the March 18 letter was not "final agency action" within the meaning of Section 307(b). That determination is correct. The agency has issued no official interpretation of the regulations because, in its view, they are clear on their face. The brief in the court of appeals simply reflects what the regulations already make plain—that the prescribed monitoring procedures may be used to determine whether primary ambient air quality standards are being met under the state implementation plans. For this reason, cases cited by petitioners (Pet. 15 n.22) for the

proposition that administrative agencies should construe ambiguous regulations before a court is called upon to review them are inapposite, and there is no occasion for this Court to exercise its supervisory power, as petitioners urge (Pet. 20-21), to direct the court of appeals to follow its own precedents in this matter.[3]

Petitioners are similarly incorrect in suggesting (Pet. 21-22) that this Court's decision in *Harrison* v. *PPG Industries, Inc.*, No. 78-1918 (May 27, 1980), governs this case. In *Harrison*, the Court held that a final determination by a Regional Administrator of EPA concerning the application of "new source" performance standards to equipment in a particular power generating facility was "final action of the Administrator * * * which is locally or regionally applicable" within the meaning of Section 307(b)(1) of the Act. Slip

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[3] *Federal Trade Commission* v. *Atlantic Richfield Co.*, 567 F. 2d 96 (D.C. Cir. 1977) involved an agency procedural rule which, in the court's view, was unclear in its application to the case before the court. In *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F. 2d 654, 665-666 (D.C. Cir. 1975), the court held only that where a party contends that new grounds have arisen for challenging an EPA performance standard for new stationary sources of air pollution, EPA should first be asked to evaluate the alleged new grounds to determine whether they warrant changing the standard. Only if the Agency then rules that the new information does not warrant a change of the standard should the court review EPA's refusal to modify the standard. Finally, in *Utah Power & Light* v. *EPA*, 553 F. 2d 215, 219 n.17 (D.C. Cir. 1977), the court of appeals merely suggested in dictum that if an agency issued an interpretive ruling that rendered a previously valid regulation invalid, the court of appeals might have jurisdiction to consider a challenge to the regulation filed after the prescribed time for challenges to regulations under Section 307(b)(1) had expired. We do not quarrel with that principle, but there is no new interpretation of any kind here.

We also note that the court below had the opportunity to resolve any inconsistency between the dismissal of petitioners' review petition and those three opinions of the D.C. Circuit on which petitioners rely. The denial of the petition for en banc rehearing—a petition in which petitioners alleged such an inconsistency—suggests that the court of appeals also believes those earlier cases to be distinguishable.

op. 1-2, 10. The parties agreed that the decision applying the regulations was final agency action within the meaning of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* (slip op. 8); no such concession is appropriate here, since the March 18 letter referred only to the Agency's brief in the court of appeals and that brief reflected only what the Administrator had previously stated in his regulations, which constituted EPA's final action in the matter.

c. To be sure, petitioners contend that the regulations were unclear and did not fairly apprise them of the necessity of filing a petition for review. But this contention raises only a narrow issue tied to the particular language involved; and it is moreover an issue unlikely to arise again, since no member of the affected industry could plausibly maintain in the future that it was unaware of what the Administrator meant by the language in question. The issue is thus not of sufficient importance to merit review by this Court.

d. We emphasize that we do not suggest that EPA would be free to take positions in its briefs in court that effectively amend its regulations, thereafter apply the regulations as amended, and then contend that the amendment is insulated from review because it is not Agency action. We submit only that such a case is not presented here, where the regulations are not ambiguous and where they are the subject of review proceedings in the court of appeals.

2. Contrary to petitioners' suggestion (Pet. 16-18), the denial of their petition in the court below presents no substantial due process issue. Even assuming, contrary to our submission, that the regulations in question were not so plain as to put petitioners on notice that a state implementation plan's compliance with ambient air quality standards could be determined by the use of running averages, petitioners have suffered no real prejudice. Petitioners contend (Pet. 6, 7) that if the regulations are thus construed, they should be regarded as effecting a change in the ambient air

quality standard for sulfur dioxide and should be set aside on substantive and procedural grounds. Those very contentions are now before the court below on the timely filed petitions of PPG and its co-petitioners, and petitioners in this case have submitted their views as amici curiae. Thus, although petitioners might be precluded by Section 307(b)(2) of the Act, 42 U.S.C. (Supp. III) 7607(b)(2), from seeking review of these regulations in any subsequent enforcement proceedings for violations of emissions limits imposed under a state implementation plan enforcing the sulfur dioxide standard, it cannot fairly be said that petitioners' arguments against the regulations as an impermissible modification of that standard have received no judicial hearing.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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